No. 01-842

IN THE

Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC.,
Petitioner,

v.

PAULA DARLENE HAMPTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly affirmed the jury's verdict that petitioner violated 42 U.S.C. § 1981, where the jury made express factual findings that petitioner—pursuant to a pervasive policy and practice of discrimination—subjected respondent to racial discrimination that interfered with and caused the loss of an actual contractual interest, where the court below applied well-settled legal standards to the facts as found by the jury, and where the court noted that its decision was aligned with those of all other circuits.

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BRIEF IN OPPOSITION

INTRODUCTION

The jury in this case found that petitioner Dillard Department Stores, Inc. ("Dillard's") violated 42 U.S.C. § 1981 when it subjected respondent Paula Hampton to racial discrimination that interfered with and caused the loss of a contractual interest. The jury expressly found that Ms. Hampton was entitled to redeem a coupon for a fragrance sample as a benefit or privilege of a purchase she had made from Dillard's, and that Dillard's subjected her to intentional racial discrimination that interfered with her ability to enjoy that benefit or privilege. Pet. App. 2a. The jury's verdict, moreover, was based in part on overwhelming evidence that at this store Dillard's had a policy and practice of discriminating against African-American shoppers because of their race.

The court of appeals affirmed the jury's verdict, rejecting petitioner's arguments that the verdict was unsupported by the evidence. The court found (1) that "[t]he jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of a contractual relationship are not against the weight of the evidence"; (2) that the jury reasonably determined that Dillard's "deliberately interfered with Ms. Hampton's redemption of the coupon and that she suffered an actual loss of a privilege of her contract because of this interruption"; and (3) that there was "ample" and "abundant" evidence from which "the jury reasonably inferred that Dillard's intentionally discriminated against [Ms. Hampton] on the basis of race." Pet. App. 13a-14a, 16a, 22a.

Nothing about this fact-intensive case warrants certiorari. Contrary to Dillard's arguments, there is no conflict among the circuits on the pertinent legal standards. Indeed, the Tenth Circuit expressly noted that "[w]e are aligned with all the courts that have addressed the issue" in ruling that a Section 1981 violation requires "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." Pet. App. 38a. And again contrary to Dillard's arguments, the Tenth Circuit's application of well-settled law to the facts as found by the jury raises no extraordinary issue of national importance. At most, Dillard's complains of "erroneous factual findings or the misapplication of a properly stated rule of law"—neither of which are grounds for certiorari under this Court's rules. S. Ct. R. 10. The petition should therefore be denied.

COUNTERSTATEMENT

1. Factual Background. On April 5, 1996, Ms. Hampton, along with her niece Demetria Cooper, their children, and another child—all of whom are African-American—went shopping at a Dillard's department store in Overland Park, Kansas. Pet. App. 3a. As the evidence at trial would later reveal, this Dillard's store had a long-

standing policy and practice of targeting black and other racial minorities for security surveillance, stops, and searches. Almost immediately upon their entrance, Tom Wilson, a Dillard's security officer, began tracking the Hampton party through the store. *Id.* at 51a. Mr. Wilson claimed that his suspicions were aroused by the party's stroller, but he was later unable to recall whether the stroller even contained a child. Aplt's App. 1010, 1040-41.[1]

Ms. Hampton and Ms. Cooper eventually made their way to Dillard's children's department to find an Easter outfit for Ms. Cooper's infant son, at all times tracked by Mr. Wilson. Pet. App. 3a, 51a. After more than fifteen minutes of Mr. Wilson's "close" and "constant" surveillance, Aplt's App. 1043, he communicated his alleged suspicion to Pam Fitzgerel, a Dillard's buyer, and asked her to surveil the party. Ms. Fitzgerel later informed Mr. Wilson that she had seen a rolled-up article of clothing under Ms. Cooper's (not Ms. Hampton's) jacket, though she was not certain that the clothing was Dillard's merchandise. *Id.* at 1046-48, 1086.[2]

Ms. Hampton purchased an outfit for the child. In return, the salesperson gave her (as well as Ms. Cooper) coupons that could be redeemed at the fragrance counter for cologne samples. Pet. App. 4a. Ms. Hampton then proceeded to the fragrance counter to redeem her coupon. *Id.* She was in the process of doing so with the fragrance consultant, Betty Chouteau, when Mr. Wilson interrupted the transaction.

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[1] "Aplt's App." refers to the Appendix filed by Dillard's in the court below. "Supp. App." refers to the Supplemental Appendix filed by respondent in the court below.

[2] At trial, Ms. Fitzgerel testified that she had not seen Ms. Cooper take any Dillard's property, Aplt's App. 1090, remove any Dillard's items from the racks, *id.* at 1091, or put anything in her jacket, *id.* at 1090, and that her perception was tainted by the comments made to her by Mr. Wilson concerning his own purported suspicions, *id.* at 1088.

Mr. Wilson informed Ms. Hampton that "the . . . black female [referring to Ms. Cooper] had been observed placing something in her coat." Pet. App. 4a. Yet he never asked to see inside the coat. Aplt's App. 808, 831, 1022. Instead, as Ms. Chouteau testified, Mr. Wilson created "a rather embarrassing situation" by taking Ms. Hampton's bag, which had remained in her possession throughout, and dumping its contents on to the counter. Pet. App. 4a-5a.[3] Ms. Chouteau, in fact, was so embarrassed that she left that area of the counter during Mr. Wilson's search. *Id.* at 5a. Though Mr. Wilson's suspicions of shoplifting were assertedly based on Ms. Cooper's activities, this search and investigation involved only Ms. Hampton, of whom Mr. Wilson had admittedly developed no suspicion. Aplt's App. 1062. Mr. Wilson compared the contents of Ms. Hampton's bag against her receipt and found that they matched. Pet. App. 51a. Rather than apologizing, however, Mr. Wilson threatened to call the police and have Ms. Hampton removed from the store if she did not calm down. *Id.* at 5a, 51a-52a.

At that point, Ms. Hampton went to the customer service counter to lodge a complaint. Pet. App. 5a, 52a. However, "she was crying and so upset that she could not write out a customer comment card, and a Dillard's employee filled it out for her." *Id.* at 81a. Moreover, she was too distraught to drive and had to call her husband for a ride home. *Id.* Meanwhile, Mr. Wilson filled out a one and a half page incident report of his own in which he "reiterated the race of the shoppers a dozen times." *Id.* at 22a.[4]

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[3] According to Ms. Hampton's "eminently credible" testimony, Pet. App. 82a, Mr. Wilson "took [the] bag, dumped the contents out on the counter, and compared them to the receipt that was in the bag, and then he shoved everything back at [her]." *Id.* at 16a.

[4] In its petition, Dillard's selectively quotes from Ms. Hampton's deposition testimony, submitted with Dillard's summary judgment motion, in which Ms. Hampton noted that, immediately

2. District Court Proceedings. Ms. Hampton and Ms. Cooper sued Dillard's for violations of Section 1981 and for false imprisonment under Kansas law. The Section 1981 claim asserted, among other things, that Dillard's interfered with their redemption of the coupons because of their race, and that this interference "violated their right to enjoy all benefits, privileges, terms and conditions of their contractual relationship with Dillard's." Pet. App. 92a. Dillard's moved for summary judgment. The court granted summary judgment on the false imprisonment claims, finding that the evidence supported a probable cause defense to the state-law tort claim, but leaving to the jury to find whether the alleged probable cause was a pretext for racial discrimination in violation of Section 1981. The Court also granted summary judgment on Ms. Cooper's Section 1981 claim, on the ground that she had no contractual relationship with Dillard's because she did not actually purchase the clothing and had not intended to make any purchases. *Id.* at 96a. Thus, only Ms. Hampton's contract benefit claim was left for trial.

The court bifurcated the issues for trial. *Id.* at 64a. In the first phase, which included no evidence of Dillard's racial discrimination, the court instructed the jury that Ms. Hampton bore the burden of proving that she "was entitled to a free cologne sample as a benefit or privilege of her purchase," that Dillard's "intentionally interfered with [her] right to enjoy the benefits and privileges of that purchase," and that

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after and in light of the humiliation she had suffered as a result of the discrimination, asking for the samples "wasn't a concern for [her]." Supp. App. 104. That testimony, however, was never presented to the jury. The jury heard testimony that Ms. Chouteau had left the counter area as a result of the incident, that Ms. Hampton was in any event too upset, humiliated, and embarrassed by the incident to complete her shopping (indeed, too upset even to drive herself home), and that Ms. Hampton understood Mr. Wilson as conveying the message that she needed to leave the store and should be glad he was letting her go. Aplt's App. 624, 832, 833.

Dillard's "intentionally prevented [Ms. Hampton] from redeeming [the] coupon." Aplt's App. 141, 139 (Instr. 10, 12); *see* Pet. App. 2a, 17a. The jury, having had the opportunity to consider the credibility of the witnesses, and in light of all the evidence, found in Ms. Hampton's favor.

The jury's finding that Mr. Wilson intentionally interfered with and prevented the consummation of Ms. Hampton's ongoing transaction was both supported by the evidence and reinforced by Mr. Wilson's contradictory and implausible account of the incident. As to the consequences of Mr. Wilson's actions, "the jury concluded that, had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon." Pet. App. 16a. And as to intent, the jury had ample reason to distrust Mr. Wilson's account. He testified at trial that he stopped Ms. Hampton and Ms. Cooper when they "were getting ready to exit the Dillard's store to go out into the mall." *Id.* at 14a. This testimony, however, was "directly contested" not only by the plaintiffs, but also by the fragrance consultant, Ms. Chouteau, who testified that Mr. Wilson stopped Ms. Hampton at the fragrance counter while she was attempting to redeem her coupon. *Id.* at 15a.

In phase two, the court instructed the same all-white jury that Ms. Hampton bore the burden of proving by a preponderance of the evidence that her "race was a motivating factor in [defendant's] conduct." Pet. App. 3a. The jury again found that Ms. Hampton had met her burden, and the jury's findings were again supported by overwhelming evidence—this time of Dillard's policy and practice at this store of discriminating against African-Americans. As the district court noted, this evidence contained testimony, including from former Dillard's employees, that Dillard's "routinely targeted and investigated African-Americans as shoplifting suspects"; that "through race codes, Dillard's targeted black customers (but not white customers) when

they entered the store";[5] that two former security officers resigned from Dillard's "in part, because of its discriminatory practices" and Dillard's refusal to end them;[6] that the local police department was concerned about Dillard's "bad arrests"; that the store " 'preyed on' and targeted African-American shoppers"; "that store incident reports identified shoppers by race and by no other characteristics"; and that "African-American shoppers were written up for 'suspicious' activity such as returning merchandise without a receipt." *Id.* at 62a-63a.[7] And, as the district court observed, "there was ample evidence that the act of selectively targeting African-Americans was authorized by [the] managerial agents for Dillard's." Pet. App. 80a.

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[5] Dillard's security guards used radio codes to refer to African-Americans (females were code 3s and males were code 4s), such that if two African-American females entered the store, a guard might advise another via radio that "we have a couple of code 3s coming in the south door." Aplt's App. 717. White customers, by contrast, were not racially identified as they came into the store. *Id.* at 766. African-American customers were placed under surveillance by Dillard's employees upon entering the store for no reason other than their race. *Id.* at 471, 745, 750, 765, 768, 973.

[6] One African-American former guard "testified that in mid-to-late 1997, he was working plain clothes security and received a call reporting that a black man was walking around the store. It soon dawned on him that he was the subject of the report, even though he had done nothing suspicious." Pet. App. 71a.

[7] As the district court noted, "the jury learned the astoundingly innocuous nature of conduct which Dillard's viewed as 'suspicious' when committed by minority shoppers—whether black, Hispanic, or otherwise," from security log entries such as " 'two black females in dresses [department],' 'four black males and one black female made purchase and left without incident,' 'two groups of black females in better dresses [department],' and 'two black females walking around with a list of some kind.' " Pet. App. 75a n.12 (citations omitted).

Dillard's pattern and practice of discrimination, combined with Mr. Wilson's lack of credibility, fully supported the jury's finding that his proffered justifications for violating Ms. Hampton's rights were pretextual. In the district court, Dillard's argued that Mr. Wilson could not have acted with discriminatory intent because the district court had granted summary judgment on the state-law false imprisonment claim, finding sufficient evidence of probable cause under the applicable state law. *Id.* at 55a-63a. As the district court made clear, however, "the Court's probable cause finding at summary judgment was not determinative of the § 1981 claim," in part because "probable cause may clearly be a pretext for discrimination when security officers detain only *minority* shoplifting suspects." *Id.* at 60a (emphasis in original).[8]

Thus, regardless of whether Mr. Wilson's testimony regarding his alleged probable cause was sufficient for purposes of summary judgment on the state law claim, the jury was entitled to find that his testimony was a pretext for discrimination. The evidence of such pretext included not only Mr. Wilson's lack of credibility but also his own testimony that he had placed Ms. Hampton and Ms. Cooper under "close" and "constant" surveillance fifteen minutes *before* he even noticed the conduct of Ms. Cooper that allegedly constituted the probable cause. Aplt's App. 1043. As the district court put it, at trial "[t]he Court * * * observed that Wilson was not a credible witness, and the jury obviously agreed." *Id.* at 79a.

Given this lack of credibility and the overwhelming evidence of Dillard's pervasive and persistent discriminatory

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[8] Moreover, as the district court noted, the fact that summary judgment was granted on the state-law claim based on the summary judgment record did not preclude the jury from discounting the evidence of probable cause based on the fuller trial record, where Mr. Wilson's credibility was a major issue. *Id.* at 59a-60a.

practices, the district court noted that there was ample basis for the jury's finding that "Wilson targeted [Ms. Hampton] and her niece at least in part because of this discriminatory practice, and that in so doing Wilson interfered with [Ms. Hampton's] enjoyment of a benefit of her contractual relationship with Dillard's in violation of § 1981." *Id.* at 63a.

The jury, no doubt persuaded by Ms. Hampton's "eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children," that "she is now unable to shop with her children for fear of future ridicule and humiliation [and that] her daughter had repeated nightmares regarding the incident," Pet. App. 32a, 81a, awarded Ms. Hampton compensatory damages for her personal injury, as well as punitive damages reflecting the reprehensibility of Dillard's policy of intentional racial discrimination.

3. Court of Appeals Proceedings. The court of appeals affirmed the district court's rulings upholding the jury's verdict. After stating that a Section 1981 claim "must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities," Pet. App. 12a, the court held that the evidence overwhelmingly supported the jury's verdict on this point, as well as all the other issues raised by Dillard's.

On the first issue raised by Dillard's, as to whether the requisite contractual relationship existed, the court held that "[t]he jury's credibility determinations and conclusion that the coupon conferred a right to a fragrance sample as a benefit of contractual relationship are not against the weight of the evidence as a matter of law." Pet. App. 13a-14a; *see also id.* at 14a ("[W]e cannot say that the jury's conclusion that the coupon was a benefit of Ms. Hampton's contract with Dillard's was unreasonable.").

On the next issue, as to whether Dillard's interfered with that contractual benefit, the court noted that "[t]he jury concluded that, had there been no interference, Ms. Hampton

would have received the service of [her] redemption of the coupon." Pet App. 16a; *see also id.* at 17a (noting that the jury was instructed that it must find that Dillard's "intentionally prevented [Ms. Hampton] from redeeming [the] coupon") (citation omitted). After reviewing the evidence supporting that finding, the court held that "[w]e do not question the jury's credibility determinations, and we cannot say that as a matter of law the jury's conclusion is incorrect." *Id.* at 16a.

The court dismissed Dillard's argument that Mr. Wilson's race-motivated interference should be immunized from review under Section 1981 because its timing was "fortuitous," holding that "Mr. Wilson's inopportune timing neither alters the resulting interruption of an ongoing transaction nor defeats this § 1981 action." *Id.* at 16a n.3. The court likewise rejected Dillard's argument that it was immunized from liability because Mr. Wilson, even if he had discriminated against Ms. Hampton on the basis of her race, allegedly had no subjective intent to interfere with her contract. The court noted that Section 1981 "protects enjoyment of the benefits of a contract from *any* impairment, so long as the impairment arises from intentional discrimination." *Id.* at 16a-17a (emphasis in original). But the court also held, in the alternative, that even if subjective intent to interfere with a contract were required, "a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if [the juror] disbelieved Mr. Wilson's testimony." *Id.*

On the next issue, as to whether Dillard's interference was motivated at least in part by race, the Court recounted the "abundant evidence" of racial discrimination, Pet. App. 22a, and concluded that "there was ample evidence (most tellingly Mr. Wilson's security report, which reiterated the race of the shoppers a dozen times, and testimony presented to the jury regarding the store's discriminatory coding practices) for the jury to determine that 'race was a motivating factor' in Mr.

Wilson's interaction with Ms. Hampton," and that "the reasons given by Mr. Wilson * * * were pretextual." *Id.*

Ruling on Ms. Cooper's cross-appeal (which is not before this Court), the court of appeals affirmed the trial court's holding that Ms. Cooper could not sustain a Section 1981 action because she—unlike Ms. Hampton—had never made or intended to make a purchase and therefore lacked the requisite contractual relationship with Dillard's. Pet. App. 38a-40a. In that regard, the court held that it "cannot extend § 1981 beyond the contours of a contract," and made clear that it was "aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination in shopping." *Id.* at 38a.

Judge Anderson dissented, but his dissent was primarily directed at what he perceived as insufficient evidence rather than a disagreement with the legal standards employed by the majority. *See id.* at 47a ("I would find that there is no legally sufficient evidence supporting the jury's verdict in favor of Ms. Hampton."). In his view, the evidence did not show that Mr. Wilson had the subjective intent to disrupt Ms. Hampton's coupon redemption. *Id.* at 45a. Additionally, the dissent contended, "[e]ven if the original surveillance of plaintiffs was race-based," there was no direct evidence of discrimination—such as "racially derogatory remarks"—demonstrating that Mr. Wilson's decision to stop Ms. Hampton was likewise motivated by race. *Id.* at 46a-47a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

This case does not implicate any conflict among the courts of appeals. To the contrary, the decision below involved a straightforward application of settled legal principles to the facts properly found by a jury, and the court itself noted that its position was "aligned with all the courts that have ad-

dressed the issue." Pet. App. 38a. Notwithstanding Dillard's attempt to manufacture a conflict, the circuits have applied the same legal standard under Section 1981, and no circuit has ever suggested otherwise. Unable to take issue with the legal standard applied by the Tenth Circuit, Dillard's is reduced to arguing that the evidence—which it only selectively presents—did not warrant liability under that standard. But a reweighing of the evidence that was presented to the jury and reviewed by both courts below is not an appropriate role for this Court. *See* Sup. Ct. R. 10.

1. The cases cited by Dillard's, far from exemplifying a "profound conflict among the circuits," Pet. 11, are entirely consistent with each other. According to Dillard's, the Tenth Circuit departed from the standard of other circuits requiring a Section 1981 plaintiff to show that "the conduct about which she complained resulted in the 'actual loss of a contract interest.' " *Id.* at 13 (citation omitted). But the Tenth Circuit did not depart from the "actual loss of a contract interest" standard. Quite to the contrary, on no fewer than three occasions the court expressly identified that precise standard as the one governing its analysis. As the court held, " 'a § 1981 claim for interference with the right to make and enforce a contract must involve the actual loss of a contract interest.' " Pet. App. 12a (citation omitted); *see also id.* at 6a (citing Tenth Circuit precedent as "requiring actual loss of contract interest for a § 1981 claim for interference with the right to make and enforce a contract"); *id.* at 6a n.1 (noting that the 1991 amendments to Section 1981 "do not alter the requirement of an actual loss of a contract interest"). Examining the evidence, the court rejected Dillard's argument that Ms. Hampton had failed to satisfy that standard, noting the jury's conclusion that "had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon," and holding that "we cannot say that as a matter of law the jury's conclusion is incorrect." *Id.* at 16a.

Dillard's says that the Tenth Circuit applied a different standard from that applied by the Seventh Circuit in *Morris* v. *Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996). But far from establishing such a conflict, the Tenth Circuit expressly relied on *Morris* in reaching its own holding. *See* Pet. App. 14a, 16a n.3. And the Seventh Circuit, for its part, expressly relied in *Morris* on the Tenth Circuit's earlier decision in *Phelps* v. *Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989), which the Tenth Circuit identified as supplying the appropriate standard in this case. *See Morris*, 89 F.3d at 414-415; Pet. App. 6a, 12a, 14a. Thus, rather than warring with each other on the proper interpretation of Section 1981, these two circuits have fully embraced each other's analytical approaches.

As the Tenth Circuit held, the evidence in this case (unlike the evidence in *Morris*) was clearly sufficient for the jury to have found a Section 1981 violation under the *Morris* standard. In *Morris*, two African-American men had been shopping at the defendant's store when they were confronted by police officers summoned by store personnel. The men left the store after the incident and later sued under Section 1981, alleging that their encounter with the police "discouraged and dissuaded" them from purchasing time stamps they had discussed a few days earlier. 89 F.3d at 414. Noting the lack of any evidence that the plaintiffs ever intended to make a purchase, the court held that the allegation of interference with " 'prospective contractual relations' " was "speculative and insufficient to state a claim under § 1981." *Id.* This case is entirely consistent with *Morris*. The Tenth Circuit faithfully applied the *Morris* standard, and upheld the jury's verdict because the evidence in this case, unlike that in *Morris*, was sufficient for the jury

to conclude that "Wilson interrupted an *ongoing transaction*." Pet. App. 17a-18a. (emphasis added).[9]

Dillard's also asserts that the Tenth Circuit applied a different standard than the Seventh Circuit applied in *Bagley* v. *Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000). *Bagley*, however, is simply another case that was dismissed because the plaintiff, proceeding on what the court described as a "prospective contract theory," could not establish that he had or would have entered into any contract. *Id.* at 520-522. In *Bagley*, a sales clerk allegedly did not serve an African-American shopper who had earlier "earned his enmity." *Id.* at 519. Another clerk, however, did offer to serve the plaintiff, but the plaintiff "promptly left the store." *Id.* at 519-520. When he returned later that day, the other clerk renewed his offer of assistance, but the plaintiff declined the offer. *Id.* at 520. In the absence of evidence that the store deprived the plaintiff of any contract interest, the court held that he could not make out a claim under Section 1981. This result is entirely consistent with the Seventh Circuit's earlier analysis in *Morris*, and with the analysis employed by both lower courts in this case, which held that the evidence supported the jury's finding that Ms. Hampton was deprived of a contractual benefit as a result of Dillard's discrimination.

Dillard's next claims that *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998), conflicts with the Tenth Circuit's decision in this case. There is no such conflict. In that case, the majority owner of a company that did business with Amoco alleged that Amoco

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[9] Indeed, the Tenth Circuit relied on this factual distinction in affirming the dismissal of Ms. Cooper's Section 1981 claim because she—like the plaintiffs in *Morris*, but unlike Ms. Hampton—did not "make or attempt to make a purchase" at Dillard's. Pet. App. 39a. Although appellees had urged that Ms. Cooper did in fact possess the requisite contractual interest, the court did not accept that argument.

had discriminated against him and his company on the basis of his race. The jury, however, found that Amoco did not interfere with the contract rights of the plaintiff's company, and it was undisputed that the plaintiff himself did not do business with Amoco individually. *Id.* at 273, 275 n.23. Under these circumstances, the Fifth Circuit found that the evidence did not support the plaintiff's Section 1981 claim, because the plaintiff never had a contractual relationship with Amoco. As the Tenth Circuit found, the facts of this case warrant a different result under the same standard. For here, unlike in *Bellows*, there was substantial evidence sufficient for the jury to find both the existence of a contract benefit and Dillard's interference with that benefit.[10]

The final appellate decision cited by Dillard's as support for the purported conflict is *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001). In that case, the plaintiff had already made his purchase from the defendant's store and was headed toward the exit when he was detained and held on suspicion of shoplifting. *Id.* at 853-854. As with the cases discussed above, the outcome in *Youngblood* turned on facts not present here. Indeed, the Eighth Circuit emphasized that its holding was entirely consistent with the Tenth Circuit's decision in this case, which the Eighth Circuit distinguished on *factual* grounds. *Id.* at 854. The Eighth Circuit observed that the contractual relationship between

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[10] The Fifth Circuit applied the same "actual loss of a contractual interest" standard in its recent decision in *Morris* v. *Dillard Department Stores, Inc.*, No. 00-30710, __ F.3d __, 2001 WL 1650937 (5th Cir. Dec. 26, 2001), which involved another Section 1981 claim against Dillard's. After reviewing its own precedent in *Bellows* and case law from other circuits, the Fifth Circuit affirmed the district court's decision granting summary judgment to the defendant because the plaintiff failed to offer any evidence "of some tangible attempt to contract with" Dillard's that "could give rise to a contractual duty between her and the merchant, and which was in some way thwarted." *Id.* at *5.

Ms. Hampton and Dillard's involved continuing duties on the part of the store, whereas the actions of which Mr. Youngblood complained did not occur until after he had already completed his purchase, at which point "neither party owed the other any duty under the retail-sale contract." *Id.*

Thus, *Morris*, *Bagley*, *Bellows* and *Youngblood* do not apply a stricter standard for liability under Section 1981 than the Tenth Circuit applied in this case. They simply apply the same standard to different sets of facts.[11]

2. The cases cited by Dillard's as evidence that other courts of appeals have established "a sweeping standard for

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[11] The district court opinions cited by Dillard's, *see* Pet. 15-16 & nn.2-4, similarly fail to establish that the lower courts have applied different standards for assessing liability under Section 1981. Indeed, in one of those cases, *Garrett* v. *Tandy Corp.*, 142 F. Supp. 2d 117, 119 n.3 (D. Me. 2001), the court relied on the Tenth Circuit's decision in this very case to support its own holding. *See also Lewis* v. *J.C. Penney Co.*, 948 F. Supp. 367, 372 (D. Del. 1996) (interference occurred after plaintiff "had done her shopping and was leaving the store; no contractual relationship remained"); *Rogers* v. *Elliott*, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) (interference occurred after plaintiffs "had completed their purchase and finished shopping at Wal-Mart") (quotation omitted); *Jackson* v. *Tyler's Dad's Place, Inc.*, 850 F. Supp. 53 (D.D.C. 1994) (no allegations to support claim of racial discrimination), *aff'd*, 107 F.3d 923 (D.C. Cir. 1996); *Jeffery* v. *Home Depot U.S.A., Inc.*, 90 F. Supp. 2d 1066, 1069 (S.D. Cal. 2000) (finding no liability because "no search ever took place" and plaintiff "was not denied service or detained"); *Robertson* v. *Burger King, Inc.*, 848 F. Supp. 78, 81 (E.D. La. 1994) (finding that "plaintiff was not denied admittance or service" and holding that "the mere fact of slow service in a fast-food restaurant does not . . . rise to the level of violating one's civil rights"); *Bobbitt* v. *Rage Inc.*, 19 F. Supp. 2d 512, 518 (W.D.N.C. 1998) (same); *compare* Pet. App. 16a-17a n.3 (citing with approval cases holding that mere delay is not actionable under Section 1981 absent the denial of admittance or service).

Section 1981 claims," Pet. 17, similarly fail to support that claim. Dillard's mischaracterizes the import of the Sixth Circuit's decision in *Christian* v. *Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir.), *supplemented*, 266 F.3d 407 (6th Cir. 2001). In that case, an African-American woman was accused of shoplifting, the police were summoned, and she and a companion were escorted from the store and were not allowed to complete their purchases. 252 F.3d at 864. The Sixth Circuit did not, as Dillard's asserts, establish a blanket rule allowing Section 1981 plaintiffs to prevail merely by showing that they received services in a "markedly hostile" manner. Pet. 17 (quoting *Christian*, 252 F.3d at 872). Rather, in the aspect of its decision cited by Dillard's the court was articulating the requirements for a *prima facie* case of discrimination. Recognizing that direct evidence of discriminatory intent is seldom available, the court held that this factor can be shown either "by demonstrating discriminatory treatment with respect to similarly situated persons," or, when such a comparison cannot be made, by showing that the defendant rendered service to the plaintiff "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." *Christian*, 252 F.3d at 872-873.

This part of the *Christian* decision, then, does not concern whether the plaintiff suffered the "loss of an actual contract interest"—the question that Dillard's claims has divided the courts of appeals. Rather, this language addresses whether the defendant acted with discriminatory intent—a finding of the jury that Dillard's does not challenge in its petition to this Court. Indeed, the *Christian* court noted that the record reflected that the plaintiff "would, in fact, have completed her purchase had she not been asked to leave the store" and therefore that the case did not present any issue as to whether there was a valid contract interest at stake. *Id.* at 874.

Dillard's similarly misconstrues the Third Circuit's holding in *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3d Cir.

1978). That case involved allegations that a bank, in cooperation with the police, had photographed its African-American customers but not its white customers. The court's statement that Section 1981 "obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens,' " *Hall*, 570 F.2d at 92, is hardly controversial and in no way conflicts with the "actual loss of a contract interest" standard applied by the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Indeed, as one court has noted, both *Hall* and the district court's decision in this case are entirely consistent because "[i]n both *Hall* and *Hampton* * * * the defendants were offering the African-American plaintiffs different and less favorable contractual terms than they offered white consumers." *Brown* v. *Phillip Morris, Inc.*, No. 98-5518, 1999 WL 783712, at *8 (E.D. Pa. Sept. 22, 1999), *aff'd*, 250 F.3d 789 (3d Cir. 2001).[12]

Thus, the petition does not implicate any conflict among the courts of appeals concerning the proper legal standard to be applied in cases brought pursuant to the "make and enforce" provision of Section 1981. That some plaintiffs have prevailed under this provision and others have not results from different factual circumstances, not different legal standards. Dillard's quarrel in this case is therefore not with the legal standard applied by the Tenth Circuit, but rather with the jury's verdict that the evidence satisfied that standard. Both the Tenth Circuit and the district court properly found that the evidence overwhelmingly did so, and that conclusion implicates no extraordinary issues warranting

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[12] Although the *Hall* court was imprecise in describing the nature of the contract interest at issue in that case, that is not surprising given that *Hall* was decided long before this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and the subsequent Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, placed renewed emphasis on that factor.

this Court's further review.[13] *See Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (stating that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975) (discussing "heavy burden under the 'two-court rule' " when challenging factual findings concurred in by both lower courts); *see also Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (deferential standard governing review of jury verdicts requires courts to "review the record as a whole," and "disregard all evidence favorable to the moving party that the jury is not required to believe").

II. THIS CASE INVOLVES NO RECURRING ISSUE OF NATIONAL IMPORTANCE

Faced with no actual conflict in the lower courts regarding the proper legal standards, Dillard's—without disputing the overwhelming evidence that it engaged in racial discrimination—stresses several other factual aspects of this case that it apparently contends justify reversal. Dillard's then argues that this Court's review is required so that retail stores will have a clear understanding that Section 1981 does not prohibit racial discrimination in such circumstances. Far from showing that its petition involves unsettled legal issues of national importance, Dillard's emphasis on the factual minutiae of this case demonstrates the opposite.

Throughout its petition, Dillard's highlights the "negligible value," Pet. 8, 10, 19, of the contract interest at issue, the "fortuitous timing," *id.* at 3, 9, 10, 20, 22, of Mr. Wilson's "brief investigative stop," *id.* at 3, 4, 7, 12, 18, 19, 20, 21,

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[13] Even the dissent did not argue that the majority had applied an incorrect standard or one rejected by other courts. Indeed, the dissent cited no case from any other circuit, and instead took issue with the sufficiency of the evidence supporting the jury's verdict. *See* Pet. App. 47a.

and the asserted absence of any specific intent on his part to interfere with Ms. Hampton's contract rights, *id.* at 9, 10, 20. But none of this alters the central facts—found by a jury, amply supported by the evidence, and uncontested here by Dillard's—that Ms. Hampton was entitled to redeem a coupon for a fragrance sample as a benefit or privilege of a purchase she had made from Dillard's, and that Dillard's subjected her to intentional racial discrimination that interfered with her ability to enjoy that benefit or privilege.

No court has ever adopted Dillard's apparent position—that a store can discriminate against customers on the basis of race provided the discrimination interferes with transactions of only "nominal" or "negligible" value, the timing of the discrimination is "fortuitous," or the person engaging in the intentional discrimination did not have the subjective intent to interfere with the transaction. These inconsequential factual distinctions hardly implicate any "important and recurring issue of federal law," as Dillard's contends. Pet. 22. As shown above, the legal standards governing this case are well established. Far from bringing certainty to the law, adopting Dillard's fact-specific distinctions would unsettle the clear legal standards applied by the lower courts, and replace them with a host of factual distinctions that have no relevance to the goals or purposes of Section 1981.

Section 1981 protects the right to be free from discrimination in the making and enforcement of contracts. Contrary to Dillard's suggestion, Pet. 10, this right is not tied to the economic value of the contract at issue. *See Runyon* v. *McCrary*, 427 U.S. 160, 172, 182 (1976) (noting that the damages suffered by the plaintiffs from a "classic violation of § 1981," whether "characterized as involving 'injured feelings and humiliation' * * * or the vindication of constitutional rights," "was to their persons, not to their realty or personalty") (citations omitted). Contractual transactions often involve items of small value, but the jury here properly found that racial discrimination interfering with such trans-

actions is just as actionable as discrimination interfering with transactions of larger value. It is therefore immaterial that Dillard's discriminatory actions interfered with Ms. Hampton's redemption of a fragrance coupon rather than with the purchase of her grand-nephew's Easter outfit, because both were benefits of her transaction, as the jury found.

Similarly, Dillard's repeatedly attempts to characterize its discrimination as innocuous because its timing was "fortuitous" and because it was part of an investigatory stop allegedly supported by "probable cause." Neither of these elements negates the discriminatory nature of Mr. Wilson's actions. And neither is legally relevant to this case. Mr. Wilson could have interfered with Ms. Hampton's transaction at the checkout counter instead of the fragrance counter; this timing, too, would have been fortuitous. But in either case, it would not alter the jury's determination—unchallenged here by Dillard's—that Mr. Wilson's actions were racially motivated and interfered with an ongoing contractual relationship. This jury determination also renders irrelevant the assertion that Mr. Wilson acted on "probable cause." As the Tenth Circuit noted, "there was sufficient evidence presented for the jury to infer [Dillard's] reasons were pretextual." Pet. App. 19a (citation omitted); *id.* at 19a n.4.[14]

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[14] Relying on testimony by Mr. Wilson that was later contradicted at trial, the district court found that probable cause existed within the meaning of the Kansas merchants' defense statute, Kan. Stat. Ann. § 21-3424, justifying dismissal of the plaintiffs' false imprisonment claims. Pet. App. 95a-96a. As both lower courts recognized, this state-law determination at the summary judgment stage was not determinative of the Section 1981 claim. *Id.* at 19a n.4, 28a, 56a. Thus, contrary to Dillard's' claims, the inapplicability of a defense to a state-law tort for false imprisonment to a federal anti-discrimination statute does not "implicate[ ] important questions regarding the division of authority between Federal and State government." Pet. 24.

Finally, Dillard's suggests that its interference with Ms. Hampton's contract rights is not actionable because "Wilson's testimony does not suggest he had the subjective intent to prevent the redemption of the coupon." Pet. 20. According to this novel theory of Section 1981 liability, it is not enough that a defendant acted with discriminatory intent and that his actions interfered with the making or enforcement of a contract; the defendant must also have the subjective intent to interfere with the transaction. This interpretation of Section 1981—far from implicating a circuit conflict on an important issue of law—is not supported by the statutory language or any decisional precedent. As the Tenth Circuit correctly held, intentional racial discrimination that interferes with the making or enforcement of contracts is actionable under Section 1981 regardless of whether the defendant subjectively intended to interfere with the contractual interest. Pet. App. 17a. In any event, this case does not even present that issue, as the Tenth Circuit held in the alternative that Dillard's could not escape liability even under this heightened standard given the evidence in the case. *See id.* ("Even under the dissent's suggestion that subjective intent to interfere with a contract is required, a reasonable juror could find a legally sufficient evidentiary basis to support such a finding, if [the juror] disbelieved Mr. Wilson's testimony.").

There is therefore no need for this Court to review this case in order for retail establishments to "enforce consistent policies" and avoid a "patchwork of procedures and protocols." Pet. 23-24. Based on the clear law applied uniformly throughout the Nation, Dillard's should have long ago adopted uniform policies preventing, at a minimum, intentional racial discrimination that interferes with "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a), (b). The evidence in this case showed that Dillard's lacked such policies at its Overland Park store and yet Dillard's now

argues that it needs guidance from this Court that would, for instance, authorize its stores to engage in intentional racial discrimination against customers that interferes with purchases of "nominal value," that involves "fortuitous" timing, or that is not undertaken for the subjective purpose of interfering with contractual rights. No such guidance is needed. Dillard's should instead take its guidance from the statute itself, from the uniform legal standard applied by the lower courts, and from the jury's verdict based on the evidence in this case.

The petition asks this Court to review the factual determinations made by a jury and upheld by the lower courts under legal standards upon which the courts of appeals are in agreement. There is no cause for the Court to engage in this intensely factual inquiry, which presents no unsettled issue of federal law.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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